IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 91 of 1992
with
CRIMINAL APPEAL No. 149 of 1992

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT
and
Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

MALDEBHAI KARSANBHAI
Versus
STATE OF GUJARAT

Appearance:
1. Criminal Appeal No. 91 of 1992
MR AD SHAH for Petitioners
MR KT DAVE APP for Respondent No. 1

2. Criminal Appeal No. 149 of 1992
MR KT DAVE APP for Petitioners
MR AD SHAH for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT
and
MR.JUSTICE A.L.DAVE

Date of decision: 21/11/2000

ORAL JUDGEMENT (Per : Miss R.M Doshit, J.)

These two appeals challenge the judgment and order of the learned Additional Sessions Judge, Junagadh passed on 31st December, 1991 in Sessions Case No. 24 of 1991. Six persons viz., Malde Karsan [Accused No. 1], Ashok Malde [Accused No. 2], Dharmendra @ Dhiru Malde [Accused No. 3], Kadviben Malde [Accused No. 4], Samju Rama [Accused No. 5] and Paba Rama [Accused No. 6] alongwith a child accused Mayur Malde were alleged to have formed an unlawful assembly with a view to committing murder of the deceased Devsi Rajde and Rana Devsi, the father and the son, and of committing murder of the said two deceased persons. Further, the accused no. 1 was charged for an offence punishable under Section 324 IPC for causing injury to the complainant Alshi Devsi with a spear and Dhiru Malde - accused no. 3 was charged for an offence punishable under Section 324 IPC for causing injury to the witness Deva Rajde with an axe. The learned trial Judge, by his judgment and order dated 31st December, 1991, convicted Malde Karsan [Accused no.1] and Dhiru Malde [Accused no. 3] for the offences punishable under Sections 302, 148 and 324 IPC and Ashok Malde [Accused no. 2] for the offence punishable under Sections 302 and 148 IPC. The accused no. 1 has been sentenced with rigorous imprisonment for life for the offence punishable under Section 302 IPC and with rigorous imprisonment for one year for each of the offences punishable under Sections 148 and 324 IPC. All the three sentences have been ordered to run concurrently. The accused no. 2 has been sentenced with rigorous imprisonment for life for the offence punishable under Section 302 IPC and with rigorous imprisonment for one year for the offence punishable under Section 148 IPC. The accused no. 3 has been sentenced with rigorous imprisonment for life for the offence punishable under Section 302 IPC and rigorous imprisonment for one year for each of the offences punishable under Sections 148 and 324 IPC. The accused nos. 4,5 and 6 viz., Kadviben Malde, Samju Rama and Paba Rama have been acquitted. Feeling aggrieved, the accused nos. 1,2 and 3 ie., Malde Karsan, Ashok Malde and Dhiru Malde have preferred the above referred Appeal No. 91 of 1992 in so far as their conviction and sentence are concerned. Feeling aggrieved, the State has preferred the above Criminal Appeal No. 149 of 1992 in so far as the accused no. 4 Kadviben Malde has been acquitted.

The incident in question occurred on 30th September, 1990 at around 8 O'clock in the evening. In the said incident, all these accused persons and the child accused Mayur Malde are alleged to have assaulted deceased Devsi Rajde and Rana Devsi with lethal weapons like spear, axe, dharia and sickle and are alleged to have caused death of the said Devsi Rajde and Rana Devsi. It is also alleged that Alashi Devsi, the son of the deceased Devsi Rajde and Deva Rajde, the brother of the deceased Devsi Rajde attempted to rescue deceased Devsi Rajde and Rana Devsi and to restrain the accused from inflicting further injuries to the deceased Devsi Rajde and Rana Devsi, in this attempt, both the said persons received injuries on their person. In respect of this incident, the complaint Exh. 108 was lodged by the injured witness Alasi Devsi [PW-17]. In the complaint, he has stated that on 30th September, 1989 at around 8 O'clock in the evening, he was sitting in the court yard of Devabhai Menand when he heard one Ratanben Menand shouting that Malde Master [accused no. 1] and his sons had assaulted Devsi Rajde and Rana Rajde. Hearing the said shouts, Alasi Devsi came out of the house and ran towards the place of incident, followed by the injured witness Devabhai Rajde [PW-18]. The incident happened in Vadhiya Sheri of village Sarama near the house of the Police Patel. According to the complainant Alasi Devsi when he approached the place of incident, the accused no. 1 Malde Karsan was hitting his father Devsi Rajde with a spear, the accused nos. 2 and 3 Ashok Malde and Dhiru Malde were hitting him with an axe. The child accused Mayur Malde was hitting his brother Rana Devsi with a dharia and the accused no. 4-Kadviben Malde was hitting Rana Devsi and Devsi Rajde with the sickle. There were two unknown persons armed with axe and both of them were hitting both the deceased persons viz., Devsi Rajde and Rana Devsi with their axes. When the complainant Alasi Devsi tried to interfere, the accused no. 1 Malde Karsan hit him with a spear which struck him near the nose and his uncle Deva Rajde was hit by an axe which hit him below the neck. Many villagers had gathered at the spot of the incident. The deceased Devsi Rajde had died on the spot and Rana Devsi had suffered severe injuries and had become unconscious. Four ladies from the crowd picked up Rana Devsi and carried him to the house. His aunt Deviben went to send a telephonic message. He also stated that some 25 days before the date of the incident, accused no. 1 Malde Karsan [Master] had abused his aunt Deviben which resulted into a quarrel between the deceased Devsi Rajde and the accused Malde Karsan and his sons. The accused Malde Karsan and his sons had

inflicted some knife wounds upon deceased Devsi Rajde for which a complaint was lodged. The assault in question was made on account of the said animosity . Said Deviben Rajde [PW 13] has in her evidence stated that after the incident she had informed one Bikharama about the death of hear brother Devsi Rajde and the injury caused to Rana Devsi. She had instructed him to call the police and she also had gone to send a telephonic message. She had also informed the telephone operator that one person was killed, one person was grieviously injured and two others were also injured and police be summoned immediately. The evidence of Deviben (PW-13) in this regards has been supported by Bhikhabhai Ramabhai (PW-12); Karabhai Keshabhai (PW-11); Karsanbhai Nagjibhai [PW-10], a Lineman in the Telephone Exchange at village Sarama; and Devsibhai Somabhai [PW-22], Wireless Operator at Shil Police Station. The message received at the Shil Police Station was recorded in the log book entry Exh. 90. The log book entry 90 has recorded the message, inter alia, that one person was murdered at village Sarama in a free fight [maramari]. Upon receipt of the aforesaid message, the Police Sub-Inspector at Shil Police Station, one Bhupatbhai Govindbhai Chawla [PW-23] had made a Station Dairy entry Exh. 84 and had proceeded towards the village Sarama. He noticed a dead body lying in Vadhiya Sheri and was taken to the house of the deceased where an injured person was lying in a cot and he was immediately taken to Madhavpur Dispensary by a State Transport Bus. Deva Rajde (PW-18) and Deviben (PW-13) accompanied the injured and he recorded the complaint Exh. 108 of Alasi Devsi. He prepared an inquest panchnama Exh. 20 and of the scene of offence Ex. 100. He collected the muddamal articles, blood samples, blood stained soil and control soil. He also recorded statements of various witnesses. The accused no. 4 Kadviben presented herself with the sickle. She was arrested and the muddamal sickle was seized by the panchnama Exh. 43 in the presence of the panch. House of the accused was searched in presence of the panch and the accused no. 4 Kadviben and the muddamal articles pipes 2 in number, axes 2 in number, spear one in number and a stick one in number were recovered and seized in the afternoon of 1st October, 1990 ie., the next date, under panchnama Exh. 45. The accused no. 1 Malde Karsan and child accused Mayur Malde presented themselves at Shil Police Station on 1st October, 990 at around 8.30 in the evening and were arrested under panchnama Exh. 32. Some more statements were recorded on 2nd October, 1990 and accused nos. 5 & 6 Samju Rama and Paba Rama were arrested from there village Ossa at around 3.30 in the afternoon under the panchnama Exh. 35. No weapon was found from their

house. The muddamal articles were sent to the Forensic Science Laboratory.

The prosecution has relied upon the evidence of two injured eye-witnesses Alashi Devsi [PW-17] and Deva Rajde [PW-18]. The prosecution has also relied upon the other eye-witnesses viz., Jivabhai Hirabhai [PW-8], Ratanben Menand [PW-9], Deviben Rajdebhai [PW-13], Meraman Devashibhai [PW-14], Mulu Bhura [PW-15] and Ranmal @ Girnari Gigabhai [PW-16]. The eye witnesses namely Meraman Devashibhai [PW-14] and Mulu Bhura [PW-15] and Ranmal @ Girnari Gigabhai {PW-16} have turned hostile.

The evidence of Ratanben Menand, daughter of Devsi Rajde has not been believed by the learned trial Judge as her house was not situated at a place which would offer clear vision of the place of the incidence. Besides, her evidence has been found to be improved in material particulars as regards the accused leaving the spot of incident and passing by her. The witness Deviben Rajde has stated that at the relevant time, she and her niece Sunderben were present in the house of Devsi Rajde and on hearing shouts, she and Sunderben approached the place of incident. She saw Malde Master [Accused no. 1] and his sons, in all seven persons, hitting her brother Devsi Rajde and nephew Rana Devsi with weapons. She has stated that Malde Karsan had a dharia, Dhiru and Ashok Malde had axe, Mayur Malde had a pipe, Kadviben Malde was armed with sickle and Samju and Paba were armed with sickle. Her brother Devsi Rajde and nephew Alashi Devsi received injuries while interfering in the assault. Eye witness Alashi Devsi has stated that Malde Karsan had a spear and two unknown persons [he did not recognize Samju Rama and Paba Rama] had a pipe and an axe. The eye-witness Deva Rajde [PW-18] also did not recognize Samju Rama and Paba Rama. According to him, Malde Karsan had a spear, Dhiru and Alashi were armed with axes, Mayur Malde had a pipe, Kadviben was armed with a sickle and two unknown persons had a pipe and a sickle.

The post-mortem of both the dead bodies was performed by the Medical Officer Dr. Dinesh Manubhai Thakore [PW-4]. On the body of Devsi Rajde, he found as many as 14 injuries, 12 of which were incised wound, injury nos. 13 and 14 were puncture wounds. The skull had broken open and the brain was protuding from the skull. The small intestine was slashed which corresponded to external injury no. 14. All the injuries were anti mortem and could have been caused by a sharp cutting weapon like sickle, spear and/or axe. The

injuries nos. 1 & 2 were sufficiently grave to cause death in natural course. On the body of the deceased Rana Devsi, he found as many as 13 injuries of which 11 were incised wound and one was a puncture wound. The injury no. 13 was an abrasion. He opined that such injuries could have been caused with a sharp cutting weapon like axe, sickle and spear. The injuries nos. 1 and 11 were sufficiently grave to cause death in natural course. It should be noted here that none of the injuries inflicted upon either of the deceased persons was caused by hard and blunt weapon like stick or pipe. The said Medical Officer had also examined the injured witness Alashi Devsi who had received an incise wound near the nose and the injured witness Deva Rajde who had an abrasion on the left shoulder. Dr. Bhargav Pandit [PW-2] had examined the accused no. 2 Ashok Malde and had certified that Ashok Malde had received an abrasion and had suffered surgical emphysema. A contusion was found on his left hand and he was referred to the Hospital at Junagadh. Dr. Govind Maru [PW-3] had certified that Ashok Malde had suffered Surgical Emphysema on the left side of his chest below the armpit. He was admitted to the hospital on 1st October, 1990 and was discharged on 3rd October, 1990.

Upon examination of the records, we find that the incident occurred near the house of Malde Karsan [Accused no.1] on Vadhiya Sheri. Vadhiya Sheri, the street on which the incident happened, is not a straight lane but it is a zigzag lane. Three other streets meet at the spot on which the incident took place. Considering the location of the house of witness Deviben Rajde which is on a street at the right angle to the Vadhiya Sheri and some 250 ft. away from entrance to Vadhiya Sheri. It would not be possible for Deviben to come out of the house and reach the spot from which she could have seen the incident within the few minutes within which the entire incident must have taken place. Even if her statement that she was sitting at the house of her brother Devsi Rajde were to be believed, the house of Devsi Rajde is also not situated at Vadhiya Sheri or in the near vicinity of the place of incident. The incident, as it happened, could not have taken more than two to three minutes and within this short time, this witness could not have heard the shout, come out of the house and have reached the vintage spot from where she could have witnessed the entire incident ie. all the 26 blows given to the deceased persons. Similarly, the location of the house of the witness Ratanben also is not such which could enable her to see the entire incident as described by her. Further, it has come in evidence that

some 25 days before the date of the incident, the accused Malde Karsan had abused Deviben Rajde which resulted into a quarrel and Malde Karsan had assaulted deceased Devsi Rajde. Deviben, therefore, was inimical against the accused Malde Karsan and his sons and is highly interested witness. Considering the location of the house of Deva Rajde, where the injured witness Alashi Deva and Deva Rajde were sitting, it is not possible to believe that after hearing the shouts they could have come out of the house of Deva Rajde and could have reached the spot of occurrence and also could have seen the entire incident as described by them. The only inference that can be drawn is that either the said witness Alashi Devsi and Devsi Rajde have not seen the entire incident, as described by them or that they were present at the spot of occurrence right throughout the incidence which would belie their evidence that they were sitting in the house of Devsi Rajde. The prosecution has also failed to account for the injuries received by the accused Ashok Malde. As discussed hereinabove, the accused Devsi Malde had developed surgical emphysema. In the Butterworths Medical Dictionary `Emphysema' has been described as, "A condition in which the alveoli of the lungs are dilated". `Surgical Emphysema' is described as, `a condition in which air is present in the subcutaneous tissues either from injury to, or operation on, the lungs or air passages, or occassionally from suction of air into a wound direct from the exterior'. Dr. Bhargav Pandit [PW-2] and Dr. Govind Maru [PW-3] both have opined that accused Ashok Malde had developed `surgical emphysema' on the left side of the chest. This necessarily means that in the incidence in question, the accused Ashok Malde also received injuries which the prosecution has failed to explain. We also find that investigation carried out by the Investigating Officer Bhupat Govind [PW-2], PSI-Shil Police Station is also not impartial inasmuch as that though the accused no. 4 Kadviben Malde was arrested and the sickle also was seized from her, not a single injury by sickle appears to have been caused upon either of the deceased persons or either of the injured eye-witnesses. Neither of the injuries to the deceased has been caused by hard and blunt substance like stick or pipe. However, in course of investigation, the Investigating Officer has reported recovery of two pipes from the house of the accused Malde Karsan, both of which were found to be blood stained. There is one more reason which makes the evidence of the injured eye-witnesses doubtful ie., the identity of the accused nos. 5 and 6 Samju Rama and Paba Rama. It has been disclosed in the evidence that Samju Rama and Paba Rama were the first cousins of deceased Devsi Rajde. It

is not possible that the injured eye-witnesses who are near relatives of Devsi Rajde could not have identified or recognized the said accused Samju Rama and Paba Rama. Besides, there is improvement in the evidence of the eye witness Alashi Devsi [PW-17] with respect to weapons carried by the said accused Samju Rama and Paba Rama. Initially they were accused of being armed with axes, however, in evidence, they have stated to have been armed with pipe and stick. Thus, having regard to the totality of the evidence on record, we find that the prosecution has suppressed the genesis or origin of the occurrence which led to the death of Devsi Rajde and Rana Devsi.

The presence of the accused Samju Rama and Paba Rama and accused Kadviben Malde is also highly improbable. If their presence at the place of offence is not established beyond reasonable doubt, the charge of forming an unlawful assembly cannot be sustained for a minute. In our opinion, the learned trial Judge has rightly dismissed the charge of forming an unlawful assembly framed against the accused persons.

Mr. Shah has submitted that considering the totality of the evidence, if the prosecution evidence is found to be doubtful, the accused shall get the benefit of doubt and are entitled to an acquittal. He has also submitted that in the event the prosecution fails to bring forth the genesis or the origin of the whole incidence, such suppression shall be fatal to the prosecution. In support of his arguments, he has relied upon the judgments of the Hon'ble Supreme Court in the matters of Lakshmi Singh & Ors. vs. State of Bihar, [AIR (1976) SC 2263]; State of Karnataka v. Siddappa Basanagouda Patil & Anr., {AIR (1990) SC 1047} and of Ram Sunder Yadav & Ors., v. State of Bihar, [1998 SCC (Crime) 1630].

Mr. Dave has submitted that mere failure of the prosecution to explain each and every injury sustained by the accused shall not entail acquittal. He has also relied upon the FSL reports and has submitted that human blood of Group-B has been found on the cloths of the deceased, the blood swab [control] and on the muddamal pipes and axes. He has submitted that admittedly the wounds caused to the deceased Rana Devsi could have been caused by axe and accused nos. 2 and 3 were alleged to have been armed with axe. Both the axes were recovered from the house of the accused Malde Karsan and it, therefore, stands proved that the death of deceased Rana Devsi was caused on account of the injuries sustained by him from the axe blows given by the accused nos. 2 and 3

Ashok Malde and Dhiru Malde. He has relied upon the judgment of the Hon'ble Supreme Court in the matter of State of Rajasthan v. Major Singh & Ors., [AIR (1999) SC 1073].

In the matter of Lakshmi Singh & Ors., the Hon'ble Supreme Court observed that, "..It seems to us that in a murder case, the non-explanation of the injuries sustained by the accused at about the time of the occurrence or in the course of altercation is a very important circumstance from which the Court can draw the following inferences :

[1] That the prosecution has suppressed the genesis and the origin of the occurrence and has thus not presented the true version;

[2] that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and therefore their evidence is unreliable;

[3] that in case there is a defence version which explains the injuries on the person of the accused it is rendered probable so as to throw doubt on the prosecution case.

The omission on the part of the prosecution to explain the injuries on the person of the accused assumes much greater importance where the evidence consists of interested or inimical witnesses or where the defence gives a version which competes in probability with that of the prosecution one...We must hasten to add that as held by this Court in State of Gujarat v. Bai Fatima, Criminal Appeal No. 67 of 1971 decided on March 19, 1975 = [Reported in AIR 1975 SC 1478] there may be cases where the non-explanation of the injuries by the prosecution may not affect the prosecution case. This principle would obviously apply to cases where the injuries sustained by the accused are minor and superficial or where the evidence is so clear and cogent, so independent and disinterested, so probable, consistent and credit worthy, that it far outweighs the effect of the omission on the part of the prosecution to explain the injuries."

In the matter of Re-Siddappa Basanagouda Patil & Anr., [Supra], considering the effect of suppression of genesis and origin of occurrence by the prosecution, the Court observed that, `..as to how the occurrence originated there is no clear evidence. But, we have to infer from the circumstances that the deceased had not received all the injuries while he was on the road as spoken to by PWs 1, 2 and 6 but even earlier to the

arrival of the witnesses to the scene when the deceased trespassed into the house of the respondents and picked up quarrel with them. Hence, we are in full agreement with the view expressed by the High Court that there is suppression of genesis and origin of the occurrence." The Court, therefore, refused to interfere with the conviction recorded under Section 304 Part-II. Same is the view followed in the matter of Ram Sunder Yadav & Ors {Supra}.

In re-Major Singh & Ors. (Supra), the learned APP Mr. Dave has relied particularly upon paragraph 4. In the case before the Hon'ble Supreme Court, the assailants were all armed with weapons and the incident was witnessed by her daughter, the eye witness. She had seen the incident from some distance. On facts, the court found that there was nothing on the record to suggest that the deceased started attack or assailed any one of the accused; the accused were armed with deadly weapons; there was a previous enmity between the parties and for an earlier incident, a case was pending. The lack of precise evidence whether the accused inflicted injuries by the sharp or blunt side of the weapon or lack of explanation as to how the deceased as well as the injured witnesses got incised injuries as well as contuses were not held to be of great significance. The Court observed that, `it would be practically impossible for any injured witness to exactly notice and memorize that which accused was assaulting by blunt side of the weapon and which accused was causing injuries by sharp edged weapon. Even if such statement is made, it may amount to an exaggeration because when number of assailants are there, injuries are not inflicted in a manner which could be exactly noted by the witness. "

As discussed hereinabove, the absence of explanation as regards the injury sustained by the accused Ashok Malde is not the only lacuna in the case of the prosecution. The veracity of the statements of the eye witnesses injured Alashi Devsi and Deva Rajde is also doubtful. If they had witnessed the incident exactly the way they have stated, they surely should have known the origin of the occurrence but the same is suppressed. They being unable to recognize the accused nos. 5 & 6 Samju Rama and Paba Rama though they were first cousins of deceased Devsi Rajde also cast a shade of doubt on their evidence. Further, the prosecution has failed to explain the discovery of two blood stained pipes from the house of the accused Malde Karsan, though neither of the accused was alleged to have been armed with pipes in the complaint lodged by Alashi Devsi nor any injury was

reported to have been caused by a hard and blunt substance like a pipe. The discovery of the said pipes and the blood stains on the said pipes also weakens the prosecution case. Considering these several lacunae, in the case put forth by the prosecution, we must hold that the prosecution has failed to prove the guilt of the appellants-accused beyond reasonable doubt. As a necessary consequence, all the accused-appellants are entitled to the benefit of doubt. We accordingly give benefit of doubt and acquit all the appellants-accused of the charge framed against them. The conviction and the sentence passed upon the appellants-accused are quashed and set-aside. The accused appellants, unless required to be detained in some other case, be released forthwith. The acquittal of accused no. 4 Kadviben Malde is confirmed. Criminal Appeal No. 91 of 1992 accordingly stands allowed and Criminal Appeal No. 149 of 1992 stands dismissed. The muddamal be disposed of as directed by the trial Court.

[Miss R.M Doshit, J.]

[A.L Dave, J.]

Prakash*